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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALPHONSO MARKUS DURAZO,

Defendant and Appellant.

F064173

(Super. Ct. No. F11905479)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

Jan B. Norman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Gomes, Acting P.J., Kane, J. and Detjen, J.

A jury convicted defendant Alphonso Markus Durazo of first degree burglary (Pen. Code,[1] §§ 459, 460, subd. (a)), and he admitted serving five prior prison terms (§ 667.5, subd. (b)). Sentenced to 11 years in prison and ordered to pay various fees, fines, and assessments, he now appeals, raising multiple claims of ineffective assistance of counsel. We affirm.

FACTS

Shortly after 8:45 a.m. on September 20, 2011, Leticia Aranda returned to her home on Barcus Street, in Fresno, to find her neighbor's garage door partially open.[2] It had not been open a short while earlier, when Leticia took her children to school. Leticia knew the neighbor, a police officer, was not home.

As Leticia and Jerry were outside, Leticia heard what sounded like banging coming from the interior garage door. Jerry described the sounds as "really hard jolts." Although he could see about three-quarters of the garage's interior, he did not see anyone.

Leticia immediately went inside and called 911. She was using a cordless phone, and walked outside while still talking to the 911 operator. Leticia told the operator what she saw and heard, and also relayed information from Jerry.

Jerry saw a person exit the garage; quickly get on a bicycle that was directly underneath, and appeared to be holding up, the garage door; and head south. Leticia passed along Jerry's description of the person to the 911 operator: no shirt, blue sweats, black ball cap worn backwards, Mexican, probably in his 30's, and wearing a dark backpack or messenger-type bag on his back.

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[1] All statutory references are to the Penal Code.

[2] For the sake of clarity, we refer to Leticia Aranda and her husband, Jerry Aranda, by their first names. No disrespect is intended.

Jerry left to follow the suspect, while Leticia stayed and watched the neighbor's house. By the time Jerry got in his car, he had already lost sight of the person for two to three minutes. Jerry drove down the block, looking. He found the person after about 10 to 15 minutes, at Gates and the Fig Garden Loop, headed south toward Shaw and Brawley. Jerry telephoned Leticia to let her know.

Fresno Police Officers Michael Toepfer and Frank Nelson were dispatched to the burglary call at 8:55 a.m. Nelson contacted Leticia, while Toepfer went in search of the suspect. While Leticia was talking to Nelson, Jerry telephoned with the location of the suspect. Leticia gave this information to Nelson, who informed Toepfer. At about 9:10 a.m., Toepfer detained defendant at the northwest corner of Shaw and Brawley. Jerry approached, gave a statement, and identified defendant. Toepfer then arrested defendant. According to Jerry, who also identified defendant at trial, everything about the person detained was the same as the person who came out of the garage, including race, age, clothing, and a black binocular-type bag with a long black strap. In addition, the detained person had a large tattoo on the left shoulder area that was consistent with what Jerry saw on the person who exited the garage.

Detective Christopher Franks subsequently interviewed defendant. After advising defendant of his rights, Franks asked if defendant would like to talk to Franks about the break-in. Defendant replied that he did not break into a house. Franks had not mentioned a house was involved. Franks asked how defendant knew about the house, whereupon defendant interrupted and said he did not kick in the door. Franks had not said anything about a door being kicked in. When Franks informed defendant he had been seen coming out of the garage, defendant denied going into the house and said he was just in the driveway, smoking a cigarette.

Jeanine Watts, whose house was involved, was out of town on the day of the incident. She did not know defendant or give him permission to enter her house. When she returned home, she found that the frame to the door between the attached garage and

the kitchen was broken by the lock. Nothing was missing from the house, however. Watts's police radio, uniform shirt, and departmental identification card were still on the kitchen table not far from the door between the garage and the kitchen.

DISCUSSION

Defendant contends he is entitled to have his conviction reversed because his trial attorney's performance was deficient. The burden of proving ineffective assistance of counsel is on the defendant. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) "To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; see generally *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.)

"In general, reviewing courts defer to trial counsel's tactical decisions in assessing a claim of ineffective assistance, and the burden rests on the defendant to show that counsel's conduct falls outside the wide range of competent representation. [Citations.]" (*People v. Ray* (1996) 13 Cal.4th 313, 349.) Nevertheless, "[a]n attorney's exercise of discretion in making tactical decisions regarding trial strategy must be both reasonable and informed. An informed decision is one made on the basis of reasonable investigation. [Citation.]" (*In re Visciotti* (1996) 14 Cal.4th 325, 348.)

"A defendant who raises the issue [of ineffective assistance of counsel] on appeal must establish deficient performance based upon the four corners of the record." (*People v. Cunningham, supra*, 25 Cal.4th at p. 1003.) "If the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance

'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 367.) In other words, "in assessing a Sixth Amendment attack on trial counsel's adequacy mounted on *direct appeal,* competency is *presumed* unless the record *affirmatively* excludes a rational basis for the trial attorney's choice. [Citations.]" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260, original italics.)

In addition to deficient performance, a defendant seeking reversal on the ground of ineffective assistance of counsel "'must carry his burden of proving prejudice as a "demonstrable reality," not simply speculation as to the effect of the errors or omissions of counsel.' [Citation.]" (*People v. McPeters* (1992) 2 Cal.4th 1148, 1177, superseded by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1107.) A reviewing court need not determine whether counsel's performance was deficient if it is easier to dispose of the defendant's claim on the ground of insufficient prejudice. (*Strickland v. Washington, supra,* 466 U.S. at p. 697.)

We have examined defendant's claims of deficient performance. As we shall explain, each is fatally flawed: Either the record on appeal does not preclude the possibility defense counsel's actions or omissions were based upon reasonable strategic decisions, in which case the claims are more appropriately addressed in a habeas corpus proceeding (*People v. Ledesma* (2006) 39 Cal.4th 641, 746; *People v. Bell* (1989) 49 Cal.3d 502, 547), or defendant has failed to establish prejudice as a demonstrable reality.

A. <u>Failure to Investigate</u>

During a *Marsden*[3] hearing held immediately prior to sentencing, defendant asserted counsel never went over the case with him or called any of the witnesses defendant thought should be called at trial. Defendant explained that he had a plastic prosthetic hip, and claimed a doctor could have been called to explain that defendant

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3 *People v. Marsden* (1970) 2 Cal.3d 118.

could never have lifted a 100-pound garage door.[4] In response, defense counsel stated he visited defendant at the jail on September 27, well before trial.[5] Counsel read and reviewed the entire file with defendant; they discussed the police report at length, and counsel told defendant this was "a classic burglary" in which defendant had been caught by neighbors, and that, in counsel's opinion, "this was going to be a very difficult case to win and [counsel] did not see much of a defense." Counsel noted in his file that defendant was angry, accused counsel of "dump trucking," and offered no alternative version of events. Rather, defendant thought the case was "worth a misdemeanor" or a trespass. With respect specifically to the doctor and plastic hip, counsel related that he had seen defendant numerous times, and they had had conversations in court every time defendant came to court. At no time, until just before counsel was to give his opening statement at trial, did defendant mention he had a plastic hip. Defendant said something like he had a bad hip and could not have kicked in the garage door. It was then defendant said he wanted counsel to get witnesses and bring doctors and records, but counsel told him "this was too late, we are already in the middle of trial, I cannot spring a surprise on the prosecution like that."

Defendant now contends his trial attorney failed to properly investigate evidence defendant was physically incapable of committing the crime and, if necessary, seek a continuance of trial. Defendant acknowledges the evidence would have had to be prepared in one day, but suggests that, since he was "on disability" as a result of his physical problems, there would have been witnesses who could have testified to his limitations, the trial court likely would have granted a request for a continuance of one-

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4 During trial, Watts testified that the spring on one side of the garage door was broken, and so she could not open the door at all. The weight of the door kept the door down. Officer Nelson was able to open and close the garage door, but estimated it weighed "a hundred pounds or more."

5 Trial began on November 29, 2011.

half day, and defense counsel could have postponed his opening statement and used the time during which the prosecution case was being presented in order to locate witnesses and medical records to verify defendant was physically unable to open the garage door.

We seriously question whether a half-day's continuance would have permitted counsel to obtain defendant's medical records, or to subpoena witnesses who could credibly testify not only that defendant had some physical impairments, but that those impairments would have rendered him unable to open the garage door. We also question whether, under the circumstances, the trial court likely would have granted even a short continuance. "The granting or denial of a motion for continuance rests within the sound discretion of the trial court.… A continuance may be granted only on the moving party's showing of good cause. [Citations.] Such a showing requires, inter alia, a demonstration that *both the party and counsel have used due diligence* in their preparations. [Citation.]" (*People v. Mickey* (1991) 54 Cal.3d 612, 660.) Unless defendant could show good cause for his delay in relating the information about his physical condition to defense counsel — a topic on which we will not speculate — the trial court would have acted within its discretion by denying any request for continuance. (See *People v. Pigage* (2003) 112 Cal.App.4th 1359, 1367.)

Moreover, even assuming defense counsel could have used the time during which the prosecution's case was being presented in order to further investigate, we have no way of ascertaining, on the record before us, what favorable evidence or helpful witnesses, if any, might have been obtained, especially given the strength of the evidence against defendant. (See *In re Hardy* (2007) 41 Cal.4th 977, 1021-1022; *People v. Williams* (1988) 44 Cal.3d 1127, 1153-1154.) That defense counsel *could* have taken other investigative steps does not automatically mean he or she *should* have taken them (*In re Cudjo* (1999) 20 Cal.4th 673, 693); "a defendant alleging ineffective assistance based on counsel's failure to obtain favorable evidence must use a petition for writ of habeas corpus to demonstrate the evidence which would have been obtained and, to the

extent possible, its effect. [Citation.]" (*People v. Geddes* (1991) 1 Cal.App.4th 448, 454.) "'We cannot evaluate alleged deficiencies in counsel's representation solely on defendant's unsubstantiated speculation.' [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 334.)

B. Undermining Defense Case

Testimony at trial established that several shoe prints were found in the dust on the floor of Watts's garage. Photographs were taken of the most visible two, which were about three feet from the outside garage door. Those photographs were admitted into evidence at trial. Defendant's shoes were seized upon his arrest and were also admitted into evidence at trial. In his opening argument, the prosecutor invited jurors to compare the photographs with the shoes to see whether the shoe patterns were consistent. In his summation, defense counsel conceded defendant entered the garage, but suggested he did so for the nonculpable reason that he heard banging or some other noise, went to see if someone needed help, caused whoever was inside to leave through the house, and, seeing nothing, immediately left. Defense counsel pointed out that nothing was missing from the house, there were no footprints matching defendant's shoes except for the two just inside the door, and there were no fingerprints or other physical evidence. Accordingly, counsel argued, the People failed to prove the intent to steal required to establish burglary. Defense counsel urged jurors to carefully examine the shoes, and argued there were a number of grooves in the soles that could have caught splinters from the broken interior door if defendant were guilty.

Defendant now claims his trial attorney "*actively undermined*" the defense by stating the shoe prints found in the garage were made by defendant's shoes. "'The decision of how to argue to the jury after the presentation of evidence is inherently tactical' [citation], and there is a 'strong presumption' that counsel's actions were sound trial strategy under the circumstances prevailing at trial. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 856.) Although a defense attorney "must not argue against his or

her client [citation]" (*People v. Lucas* (1995) 12 Cal.4th 415, 446), the California Supreme Court has recognized "the importance of maintaining credibility before the jury" (*People v. Freeman* (1994) 8 Cal.4th 450, 498), and so has "repeatedly rejected claims that counsel was ineffective in conceding various degrees of guilt. [Citations.]" (*Ibid.*)

In the present case, the record strongly suggests defense counsel recognized jurors were likely to decide defendant's shoes were consistent with the shoe tracks found inside Watts's garage. (See *People v. Venegas* (1998) 18 Cal.4th 47, 81.) At that point, defense counsel had to consider the other evidence — including an eyewitness identification of defendant as having exited the garage — and attempt to come up with an explanation that would not cause him to lose all credibility with the jury. "[T]he demonstrated risks and disadvantages of defense counsel's strategy do not establish that counsel was incompetent for adopting it. Rather, the risks and disadvantages must be considered in light of the available alternatives." (*People v. Hayes* (1990) 52 Cal.3d 577, 624.) Given the strong evidence against defendant, "we cannot say counsel was constitutionally ineffective in his attempt to make the best of a bad situation. [Citation.]" (*People v. McPeters, supra,* 2 Cal.4th at p. 1187.) Nor can we say defendant suffered any prejudice, even assuming counsel's performance in this regard was deficient.

C. <u>Failure to Request Jury Instruction on Trespass</u>

Although defense counsel attempted to suggest defendant was at most guilty only of trespass, counsel did not request that the jury be instructed thereon, and never argued to the trial court that, under the circumstances of the case, trespass was a lesser included offense of burglary. Defendant now challenges counsel's failure to request a trespass instruction.

"A trial court has a sua sponte obligation to instruct the jury on any uncharged offense that is lesser than, and included in, a greater charged offense, but only if there is substantial evidence supporting a jury determination that the defendant was in fact guilty

only of the lesser offense. [Citations.] An uncharged offense is included in a greater charged offense if *either* (1) the greater offense, as defined by statute, cannot be committed without also committing the lesser (the elements test), *or* (2) the language of the accusatory pleading encompasses all the elements of the lesser offense (the accusatory pleading test). [Citations.]" (*People v. Parson* (2008) 44 Cal.4th 332, 348-349; see also *People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.) By contrast, "a defendant has no right to instructions on lesser related offenses even if he requests the instruction and it would have been supported by substantial evidence. [Citation.] California law does not permit a court to instruct on an uncharged lesser related crime unless agreed to by the prosecution. [Citation.]" (*People v. Valentine* (2006) 143 Cal.App.4th 1383, 1387.)

"Any person who enters a building or room with the intent to commit larceny or any felony is guilty of burglary. (§ 459.)" (*People v. Foster* (2010) 50 Cal.4th 1301, 1348.) "Every person other than a public officer or employee acting within the course and scope of his or her employment …, who enters or remains in any noncommercial dwelling house … without consent of the owner … or the person in lawful possession thereof, is guilty" of misdemeanor trespass. (§ 602.5, subd. (a).)

The California Supreme Court has consistently held that "trespass is a lesser *related* offense, not a lesser *included* offense, of burglary. [Citations.]" (*People v. Foster, supra,* 50 Cal.4th at pp. 1343-1344; accord, e.g., *People v. Taylor* (2010) 48 Cal.4th 574, 622; *People v. Birks* (1998) 19 Cal.4th 108, 118, fn. 8; *People v. Lohbauer* (1981) 29 Cal.3d 364, 369; *People v. Pendleton* (1979) 25 Cal.3d 371, 382.) This is so because the entry required for burglary need not be a trespass; rather, a person may commit burglary even if he or she has permission to enter. (*People v. Frye* (1998) 18 Cal.4th 894, 954, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Lohbauer, supra,* 29 Cal.3d at p. 369.)

Defendant points to *People v. Waidla* (2000) 22 Cal.4th 690 as support for his claim of ineffective assistance. In that case, the defendant asserted the trial court erred by failing to instruct, sua sponte, on trespass as a lesser included offense. The California Supreme Court stated: "*For purposes of discussion only*, we will accept this assertion made by Waidla: Under the '"accusatory pleading" test' [citation] if not the '"legal elements" test' [citation] — *according to Waidla* — trespass should here be deemed a lesser included offense of the charged burglary, on the ground that the burglary here, which is based on larceny, comprises elements embracing intent to steal [citation], whereas trespass comprises *supposedly* the same elements with the pertinent exception of such intent [citation]." (*Id*. at p. 733, italics added.) As the emphasized language makes clear, the state high court never *decided* whether trespass could be a lesser included offense of burglary under the accusatory pleading test or how the accusatory pleading would have to be worded for such a result to occur. It is axiomatic that "'an opinion is not authority for a proposition not therein considered. [Citation.]' [Citation.]" (*People v. Hinds* (2003) 108 Cal.App.4th 897, 901.)

Here, the information alleged, in pertinent part, that defendant "did willfully and unlawfully enter an inhabited dwelling house … with the intent to commit larceny or any felony." In *People v. Birks, supra,* 19 Cal.4th at page 118, footnote 8, the California Supreme Court held that the allegations in the burglary count of the accusatory pleading before it did not necessarily include criminal trespass, where the burglary count "simply alleged that defendant 'did willfully and unlawfully enter a commercial building … with intent to commit larceny and any felony.'" Similarly, in *People v. Lohbauer, supra,* 29 Cal.3d at page 369, the high court found that an unauthorized entry — in other words, trespass — "was not encompassed within the language of the information which charged defendant with having 'entered the house of [victim] … with intent to commit theft.'" *Birks* and *Lohbauer* control. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) As defendant was not entitled to an instruction on trespass as a lesser included

offense of burglary, his claim of ineffective assistance of counsel fails. (See *People v. Mattson* (1990) 50 Cal.3d 826, 876 [claim of ineffective assistance of counsel based on failure to make motion or objection must demonstrate not only absence of tactical reason for omission, but also that motion or objection would have been meritorious].)[6]

D. Failure to Object to Judicial Misconduct

1. Background

Defendant contends his trial attorney's performance was deficient because counsel failed to object to judicial misconduct that took the form of rehabilitating a prosecution witness and denigrating defense counsel, thereby forfeiting defendant's ability to present a misconduct claim on appeal. (See *People v. Sturm* (2006) 37 Cal.4th 1218, 1237.) The complained-of incidents are as follows:

First incident

Part of the defense strategy at trial was to attempt to show that discrepancies in their testimony called the accuracy of the Arandas' observations into question. To this end, defense counsel focused on testimony concerning the telephone Leticia used to call 911. Leticia testified that, although she had a cell phone, she called 911 from the cordless phone inside the house, because she thought the address was "better found" when a house phone was used. Jerry, however, testified that Leticia used her cell phone to call, then qualified that by saying that he was not 100 percent positive, but he knew she usually carried her cell phone everywhere. He then testified he really did not know what phone she used. Defense counsel then brought Jerry's preliminary hearing testimony to

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[6] If defendant were correct that trespass was a lesser included offense of burglary, then (assuming substantial evidence supported a finding of trespass) the trial court would have had a sua sponte duty to instruct the jury on the lesser offense. Whether a trial attorney can be faulted for failing to request an instruction the court is required to give without request (see *People v. Prieto* (2003) 30 Cal.4th 226, 261) is a question we need not decide.

Jerry's attention, and elicited that Jerry believed he had testified Leticia used her cell phone. On redirect examination, the prosecutor established that Jerry testified at the preliminary hearing that Leticia had her cell phone with her all the time, but he did not remember saying specifically that she used her cell phone to call. As of the time of trial, he did not recall which phone she used.

At the conclusion of recross-examination, this took place:

> "THE COURT: All right. Sometimes, Mr. Aranda, I kind of review the testimony in the evenings just to see what is going on in the case. And you were asked yesterday about something that took place at the preliminary hearing. And specifically, you were referred to page 9 of the preliminary hearing transcript, on lines 24 through 26. Do you recall being asked about that yesterday, sir?
>
> "THE WITNESS: Uh, yes, I do.
>
> "THE COURT: And that actually dealt with whether your wife used the cell phone to call the police. Do you remember being asked about that yesterday?
>
> "THE WITNESS: Yes, uh-huh.
>
> "THE COURT: Do you remember what your testimony was at the preliminary hearing? [¶] … [¶]
>
> "THE WITNESS: I really don't recall, to be honest with you ….
>
> "THE COURT: Okay. And see, there was some confusion, at least with the Court, and I want to be sure that is cleared up. [¶] … [¶] … Because it is kind of ambiguous, the answer that was given. Counsel, referring the witness to page 9, lines 24 through 26. I'm going to ask if you can please read line 24 through 26 to yourself. It is basically one question. [¶] … [¶] … Okay. Now, do you remember giving that testimony at the preliminary hearing, sir?
>
> "THE WITNESS: Word for word, I don't recall. To be honest.
>
> "THE COURT: Okay. Because yesterday you were asked about whether at the preliminary hearing you were asked whether your wife used a cell phone to call the police. [¶] … [¶] … As you were asked that

question, I was reading the information here, and that does not appear to be the question that you were asked.

"THE WITNESS: Okay.

"THE COURT: Is that accurate based upon your reading of the question there at line 24?

"THE WITNESS: I would say that's accurate, to the best of my knowledge."

The court then asked if either counsel had any questions based on the court's questioning of the witness. Defense counsel did not. The prosecutor, however, elicited that Jerry did not believe he was asked a specific question at the preliminary hearing that required him to state whether Leticia used a cell phone or the home phone. The prosecutor then asked whether, having reviewed the transcript, Jerry ever stated specifically which phone Leticia used. Jerry responded: "I know that she always has her cell phone with her every -- just about every minute of every day for the kids, for our kids. So I don't know if she went inside to use the home phone or if she for some reason didn't have her phone that minute, I don't know. But she did -- she does always have her cell phone with her. So that's what I thought."

Second incident

Defense counsel spent some time cross-examining Officer Nelson concerning the shoe prints found in the garage. Counsel elicited that there were no shoe prints matching defendant's shoes in the dust around the broken interior door, and no physical evidence defendant entered the house itself. The following occurred during redirect examination:

"Q [by the prosecutor] Did you -- regarding the dust leading up to the doorway on the garage side, was the dust any more or less disturbed than in the more open area of the garage where you see stands 1 and 2 set up [by the visible footprints]?

"[DEFENSE COUNSEL]: Objection. Vague.

"THE COURT: Do you understand the question, sir?

"THE WITNESS: Yes.

"THE COURT: All right. Objection's overruled. *I understand it.* You can answer, sir." (Italics added.)

2. Analysis

"A trial court has both the discretion and the duty to ask questions of witnesses, provided this is done in an effort to elicit material facts or to clarify confusing or unclear testimony. [Citations.] The court may not, however, assume the role of either the prosecution or of the defense. [Citation.]" (*People v. Cook* (2006) 39 Cal.4th 566, 597.) When attempting "to bring out or clarify the evidence, '"a judge should be careful not to throw the weight of his judicial position into a case, either for or against the defendant."' [Citation.] But '[t]he object of a trial is to ascertain the facts and apply thereto the appropriate rules of law, in order that justice within the law shall be truly administered.' [Citation.] To this end, 'the court has a duty to see that justice is done and to bring out facts relevant to the jury's determination.' [Citation.] '[I]t is not merely the right but the duty of a trial judge to see that the evidence is fully developed before the trier of fact ….' [Citations.]" (*People v. Abel* (2012) 53 Cal.4th 891, 917.)

"A trial court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution. [Citations.]" (*People v. Carpenter* (1997) 15 Cal.4th 312, 353, superseded by statute on another ground as stated in *Verdin v. Superior Court, supra,* 43 Cal.4th at pp. 1106-1107.) "Trial judges 'should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other.' [Citation.]" (*People v. Sturm, supra,* 37 Cal.4th at pp. 1237-1238.) "'It is completely improper for a judge to advise the jury of negative personal views concerning the competence, honesty, or ethics of the attorneys in a trial.… This principle holds true in instances involving a trial judge's negative reaction to a particular question asked by defense counsel …. [A] trial

court's comments implying that defense counsel was behaving unethically or in an underhanded fashion constitute[] misconduct." (*Id.* at pp. 1240-1241.)

There was no judicial misconduct here. "Defense counsel is not required to advance unmeritorious arguments on the defendant's behalf. [Citations.]" (*People v. McPeters, supra,* 2 Cal.4th at p. 1173.) Moreover, even if defense counsel might have found grounds for objection in the trial court's comments or conduct — something we seriously doubt — "competent counsel may often choose to forgo even a valid objection.… 'The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal.' [Citation.]" (*People v. Riel* (2000) 22 Cal.4th 1153, 1197.) Under the circumstances here, trial counsel's failure to object "comes within this broad range of trial tactics that we may not second-guess. [Citation.]" (*Ibid.*)

E. Failure to Object to Restitution Fine

Section 1202.4 requires a trial court to order a defendant convicted of a crime to pay both victim restitution and a restitution fine. (*Id.*, subd. (a)(3)(A), (B).) When defendant committed the burglary (see *People v. Souza* (2012) 54 Cal.4th 90, 143), section 1202.4 provided, in pertinent part:

> "(b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.
>
> "(1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars ($200), and not more than ten thousand dollars ($10,000) ….
>
> "(2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.

> "(c) The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the two hundred-dollar ($200) … minimum.…
>
> "(d) In setting the amount of the fine … in excess of the two hundred-dollar ($200) … minimum, the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime. Consideration of a defendant's inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required. A separate hearing for the fine shall not be required."

In the present case, the probation officer's report (RPO) related that defendant had been disabled since 1995 and had a current net income of $825 per month from social security benefits. The RPO recommended imposition of the middle four-year term for the current offense plus five years for the prior prison terms, for a total of nine years in prison. The RPO further recommended imposition of a restitution fine in the amount of $1,800. At sentencing, however, the trial court imposed the aggravated six-year term for the present offense plus five years for the prior prison terms, for a total of 11 years in prison, and also imposed a restitution fine in the amount of $2,200.[7] Defense counsel did not object.

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[7] The court also imposed a concurrent sentence, which included a $200 restitution fine, in another case pending against defendant that was resolved by plea bargain on the day of sentencing. That case is not before us.

Defendant now complains about counsel's lack of objection, which prevented him from directly challenging the amount of the fine on appeal. (See, e.g., *People v. Nelson* (2011) 51 Cal.4th 198, 227; *People v. Gamache* (2010) 48 Cal.4th 347, 409; *People v. Scott* (1994) 9 Cal.4th 331, 354.) He says the trial court did not comment on its rationale for setting the fine at $2,200, and the pertinent factors to be considered, including ability to pay and seriousness of the offense, do not support the amount. Had defense counsel objected, defendant argues, "the trial court reasonably would have realized" the record did not support imposition of a fine in that amount.

It is readily apparent that both the probation officer and the trial court calculated the restitution fine by means of the formula recommended by subdivision (b)(2) of section 1202.4 — $200 times the number of years in prison times the number of felony counts. Within the specified statutory range, a trial court has "wide discretion" in determining the amount of a restitution fine. (*People v. Urbano* (2005) 128 Cal.App.4th 396, 406.) "[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) "The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review. [Citations.]" (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.)

Given defendant's lengthy criminal record, the fact an 11-year sentence was imposed, and the trial court's use of the statutorily recommended formula, defense counsel reasonably could have concluded an objection would gain nothing for his client. Defendant points to the fact he was receiving disability benefits and qualified for indigent representation, as evidence he had no means to pay a $2,200 fine. Defendant clearly was not completely disabled, however; regardless of whether he would continue to receive

disability payments while incarcerated, there is no reason to believe whatever disability he had would disqualify him from every job available in prison. (See *People v. Dickerson* (2004) 122 Cal.App.4th 1374, 1380, fn. 8 [restitution fines may be collected from prison wages].)

Under all the circumstances, defendant has failed to establish either deficient performance or prejudice. (See *People v. Mattson, supra,* 50 Cal.3d at p. 876.)

DISPOSITION

The judgment is affirmed.